Supreme Court, U.
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E. ROBERT SEAVER, C

in the

Supreme Court

of the

United States

OCTOBER TERM, 1970

No. 395

RUBY LAZARUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING

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The government in its brief for the UNITED STATES OF AMERICA in opposition to the Petition for Writ of Certiorari acknowledged that the petitioner was the victim of telephonic electronic surveillance.

The government alleges:

1. That only one telephone conversation was overheard on March 4, 1965.

2. That the petitioner had no proprietary interest in the premises under electronic surveillance.

3. That there is no *apparent* relevancy between the overheard telephone conversation and the instant prosecution.

The government does *not* state:

1. Whose premises were under electronic surveillance. How can the petitioner contest whether or not he had proprietary interest in the premises?

2. The period of time during which electronic surveillance took place at the particular premises. This, of course, may serve as a basis for the petitioner to prove that he was on the premises or made and received other calls.

3. The type of electronic surveillance being conducted.

4. Whether or not the electronic surveillance was illegal.

The admitted electronic surveillance occurred when the petitioner was staying at the Warwick Hotel, whose manager was a government witness herein. (Tr. 89) The Solicitor General suggests that the information relating to the Warwick Hotel was discovered during the execution of an arrest warrant and search of the Prokos brothers. Although the Solicitor General, no doubt in good faith, makes these representations, he failed to state or did not

know that three F.B.I. agents who testified in the Lazarus case, Special Agents Elmer C. Mullen (Tr. 100), Edwin J. Sharp (Tr. 119) and Warren R. Welsh (Tr. 236), were also participants in a *different*[1] admittedly illegal electronic surveillance installed at the home of one Frank Rosenthal,[2] *whose name, activities and telephone numbers permeated the grand jury proceedings and the trial of the petitioner.*

Whether or not there is a thread of taint woven into the prosecution, (made invisible by governmental interaction) can only be determined by adversary proceedings. The petitioner should not be required to accept, in a vacuum, the Solicitor General's self-serving and self-evaluating representations. This Court has heretofore rejected this method in favor of evidentiary hearings. *Alderman v. United States*, 394 U.S. 165. See also this Court's per curiam opinion in *Giordano v. United States*, 394 U.S. 310.

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[1]It is assumed that the electronic device mentioned by the Solicitor General is different than the one installed at Rosenthal's home in that the former appears to be a wiretap and the latter is a "bug".

[2]This was discovered in the case of *Kane, et al. v. United States of America*, United States District Court for the Southern District of Florida, #66-196-Cr-TC; United States Court of Appeals for the Fifth Circuit, #24911; remanded to the District Court for further evidentiary hearings, and once again now pending on appeal in the United States Court of Appeals for the Fifth Circuit, #29200.

WHEREFORE, the petitioner respectfully moves this Honorable Court to:

1. Grant the Petition for Rehearing.

2. Vacate the Judgment of the United States Court of Appeals for the Ninth Circuit.

3. Remand the case to the United States District Court for further proceedings in conformity with *Alderman v. United States, supra.*

Respectfully submitted,

E. DAVID ROSEN
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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies to this Court that the Petition for Rehearing herein is presented in good faith, not for delay, and is restricted to the grounds specified therein.

E. DAVID ROSEN